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(2)

No. 00-1717

IN THE
Supreme Court of the United States

SHIH-HUA ALAN LEE,

Petitioner,

v.

PONANI SUKUMAR, an individual, and
SARASWATI SUKUMAR, an individual,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

MOTION OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

California Public Defenders Association ("CPDA") hereby respectfully moves for leave to file the attached *amicus curiae* brief in this case. The consent of the attorneys for Petitioner Lee has been obtained. The consent of the attorneys for Respondent Saraswati Sukumar was requested but refused. The consent of the attorneys for Respondent Ponani Sukumar was also requested. Counsel for Ponani Sukumar, however, has not responded.

The interest of CPDA in this case arises from its extensive involvement in California's criminal and juvenile justice systems. The same issue before this Court in *Lee v. Sukumar*, specifically whether a court may sustain an assertion of the Fifth Amendment privilege against self-incrimination without requiring the witness to invoke the privilege on a question by question basis, impacts CPDA members' clients and witnesses called on their behalf.

In his Petition for a Writ of *Certiorari*, Petitioner necessarily focuses on the broad issue of whether the Fifth Amendment privilege against self-incrimination may be invoked in a blanket manner in either civil or criminal cases. CPDA believes the *amicus curiae* brief it is requesting permission to file will contain a narrower focus on the effect blanket assertions of the privilege against self-incrimination may have in criminal and juvenile cases.

Respectfully submitted,

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF *CERTIORARI*

I. *AMICUS CURIAE* CALIFORNIA PUBLIC DEFENDERS ASSOCIATION'S INTEREST IN *LEE v. SUKUMAR*

California Public Defenders Association ("CPDA") submits this *amicus curiae* brief in support of Petitioner Lee's Petition for a Writ of *Certiorari*.[1] CPDA is an organization comprised of public defenders and attorneys concerned with issues affecting persons having cases before the criminal and juvenile courts.

In this case, the Court of Appeal decided an issue of great importance to CPDA when it decided that a trial court can sustain a witness's invocation of the Fifth Amendment privilege against self-incrimination without making an inquiry into the validity of the assertion on a question by question basis. CPDA has a substantial interest in this issue because it raises important constitutional questions under the Fifth and Fourteenth Amendments to the United States Constitution, which may impact the clients of CPDA members.

II. SUMMARY OF ARGUMENT

Several Federal Circuit Courts of Appeals and state courts, including the California Court of Appeal hearing Petitioner's case, have recognized an exception to this Court's requirement that a witness must invoke the Fifth Amendment privilege against self-incrimination on a

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1. Counsel for Petitioner Lee participated substantially in authoring this *amicus curiae* brief. Additionally, Petitioner Lee financed the preparation and submission of this brief.

question by question basis. Thus, parties and witnesses receive different process solely based upon the court in which they appear. Such inconsistent process adversely affects both members of CPDA, as attorneys, and their clients' right to have a meaningful opportunity to be heard. This Court should grant Petitioner's Petition for a Writ of *Certiorari* to reaffirm and clarify whether a witness must assert the privilege against self-incrimination on a question by question basis.

III. ARGUMENT

As attorneys working at the trial level in the criminal justice system, members of CPDA sometimes must call witnesses who assert the Fifth Amendment privilege against self-incrimination. CPDA believes such invocations are more common in criminal cases than in civil cases because witnesses are far more aware of the ramifications of criminal activity due to the environment in which they must testify. Thus, CPDA would like to emphasize the importance of the privilege to witnesses, and the parties on whose behalf they are called, in criminal proceedings.

In the present case, the California Court of Appeal held it was not prejudicial error for the trial court to refuse to reopen the case to assess whether the privilege against self-incrimination applied to a witness who previously had been allowed by the trial court to make a blanket assertion of the privilege against self-incrimination before he was even sworn in. By holding that its refusal to reopen the case was not prejudicial error, the Court of Appeal essentially held that when a court believes a witness will properly invoke the privilege against self-incrimination as to all relevant questions, the witness does not need to invoke the privilege on a question by question basis.

This Court has recognized the importance of the privilege against self-incrimination. *See, e.g., Kastigar v. United States*, 406 U.S. 441, 444 (1972). The privilege embodies a fundamental belief of our nation that a person should not be the instrument of his or her own conviction. Further, because the privilege cannot be infringed upon by the states through the due process clause of the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), the manner in which it is invoked and applied implicates the due process rights of all citizens.

This Court has consistently recognized that a witness must be sworn in and assert his or her privilege against self-incrimination to each proffered question. *See, e.g., Rogers v. United States*, 340 U.S. 367, 374 (1951); *Mason v. United States*, 244 U.S. 362, 364-66 (1917). The Court of Appeal's decision in this case reflects a trend of some courts creating an exception to the historic rule that a witness must assert the privilege against self-incrimination on a question by question basis. *See, e.g., United States v. Tsui*, 646 F.2d 365, 368 (9th Cir. 1981); *People v. Cornejo*, 92 Cal. App. 3d 637, 659 (1979).

The creation of and adherence to this exception by some courts has led to a conflict among various federal and state courts, exposing witnesses who assert the privilege against self-incrimination to different processes of law, depending on the court in which they appear and how that court interprets the conflicting precedent. One witness may only need to state "I take the Fifth," while another witness in another court may be required to repeatedly assert the privilege on a question by question basis. Neither the witness nor the litigant relying upon the witness's testimony will be able to predict what level of protection the witness's invoked privilege will receive and what testimony will be allowed. This, in turn, may lead to erosion of respect for law and the

judicial system because similarly situated witnesses will receive different levels of protection solely based upon the court in which they happen to appear.

This Court should grant Petitioner's Petition for a Writ of *Certiorari* to secure uniformity of decision and law. It should also grant Petitioner's Petition to settle an important question of law regarding whether the privilege against self-incrimination must be asserted on a question by question basis. If the decision in this case and similar decisions around the country are allowed to stand, witnesses' right to assert their privilege against self-incrimination will receive disparate protection solely based upon the court in which the witnesses happen to appear.

IV. CONCLUSION

CPDA has a substantial interest in ensuring the uniform application and protection of the Fifth Amendment privilege against self-incrimination. For the reasons set forth above, CPDA believes the Court of Appeal's decision in this case threatens the uniform application of the privilege against self-incrimination in a manner comporting with due process of law. Petitioner's Petition for a Writ of *Certiorari* should be granted to settle this important question of law and to secure uniformity of law.

Respectfully submitted,

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